No. 95-624

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

SOUTHERN GUARANTY INSURANCE COMPANY OF GEORGIA,

Petitioner,

vs.

SOUTHEASTERN EXPRESS SYSTEMS, GEORGE BARNES, KEVIN CLARK and GERRY WAMBOLT,

Respondents.

On Petition for Writ of Certiorari to the California Court of Appeal, First Appellate District

RESPONDENTS' BRIEF IN OPPOSITION

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36 pp

QUESTION PRESENTED

1. Is an insurer that provides nationwide commercial liability coverage subject to personal jurisdiction in a California action brought by its insureds alleging against the insurer a wrongful refusal to defend the insureds against a third-party action in California?

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STATEMENT OF THE CASE

Plaintiffs "Southeastern" filed this action in California against Southern Guaranty Insurance Company of Georgia ("Southern Guaranty") for damages for refusal to defend its insured Southeastern Express Systems in *Triad Systems Corporation v. Southeastern Express Systems, Inc.*, U.S. District Court, Northern District of California, No. C92 1539 FMS ("the *Triad* case"). Southeastern seeks to recover the benefits due under the Southern Guaranty policy, as well as statutory and other relief due from a carrier that wrongfully fails to defend its insured. [J.A. 5, 6].

Triad Systems Corporation sued Southeastern in California for copyright infringement and other claims arising from the way that Southeastern advertises and carries on its nationwide business of servicing Triad computers. [J.A. 111-113, 116-118]. Southeastern tendered the defense of the Triad case to Southern Guaranty, which insures Southeastern nationwide under commercial general liability policies issued in Georgia. These policies cover advertising injury, personal injury, and property damage.[1] Southern Guaranty agreed in its policies to defend

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1. Policy BP06450 provides comprehensive business liability coverage for bodily injury, property damage and personal injury which occurs or is committed within the "policy territory." [J.A. 190]. Policy territory is defined as "the United States of America, its territories or possessions, or Canada. . . ." [*Ibid.*].

Policy BP09896 obligates Southern Guaranty to defend the insured and to "pay those sums that the insured becomes legally obligated to pay as damages" due to bodily injury, property damage, personal injury or advertising injury. [J.A. 234]. The policy applies to advertising injury caused by "an offense committed in the course of advertising your goods, products or services; but only if the offense was committed in the 'coverage territory' during the policy period." [*Ibid.*]. Coverage territory is defined as "[t]he United States of America (including its territories and possessions), Puerto Rico and Canada. . . ." [J.A. 241].

Southeastern on insured claims anywhere in "the United States (including its territories and possessions), Puerto Rico and Canada." [J.A. 241].

Southern Guaranty refused to defend Southeastern in the Triad case. After this case for refusal to defend was filed and served, Southern Guaranty filed a second case against Southeastern in Georgia in which it claims to have no duty to defend Southeastern in the Triad case. [J.A. 122-248]. Southern Guaranty moved to quash service in the California action for lack of jurisdiction, based largely on the claim that Southern Guaranty is an insular Georgia insurance carrier — without office, employees, officers, or other physical presence in California. [J.A. 42-43]. The San Francisco Superior Court granted Southern Guaranty's motion to quash. [J.A. 282-283]. Southeastern appealed from that order. [J.A. 290].

The California Court of Appeal reversed, holding that jurisdiction in California is proper over a carrier providing nationwide coverage when the carrier refuses to defend claims arising in California, which is within its coverage territory. *Southeastern Express Systems v. Southern Guaranty Ins. Co.*, 34 Cal. App. 4th 1, 40 Cal. Rptr. 2d 216 (1995). The court of appeal denied rehearing, and the California Supreme Court denied review. While this action was proceeding in the appellate courts, the Triad case was bifurcated and the first trial was held. A jury awarded Triad $738,172 in damages against Southeastern.[2]

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2. *See* appendix A to this brief in opposition. The respondents request that the Court take judicial notice of this verdict under Federal Rule of Evidence 201(b).

REASONS FOR DENYING THE WRIT

I.

INTRODUCTION

The decision of the California Court of Appeal fits comfortably within the established law of this Court, existing California law, the decisions of the federal courts in the ninth circuit, and the law of a score of other state courts. Southern Guaranty's petition construes the court of appeal's opinion far more broadly than is accurate, and review of that decision by certiorari should be denied.

The court of appeal found that Southern Guaranty by issuing nationwide insurance coverage to Southeastern had received an economic benefit from California and the other states to which this protection ran and that it had contractually agreed to appear here to defend its insured. [Opinion, p. A6, appendix A to Petition]. The court of appeal held that after a suit was filed in California that triggered Southern Guaranty's duty to defend, and Southern Guaranty refused to defend, California had the power to call Southern Guaranty to account in its courts for that breach of Southern Guaranty's policy.

The court of appeal's decision does not, as Southern Guaranty's petition suggests, authorize an insured to drag its insurance carrier into any state court based solely on the provision of nationwide coverage. The decision here limits the exercise of jurisdiction to circumstances where the insurer has refused to appear in a state to defend an insured event in that state under the terms of its nationwide policy. In fact, several states have upheld jurisdiction over a foreign carrier based solely on the existence of

nationwide coverage,[3] but this case, by presenting an insured event in California, does not require that rule to be applied in this case. This case links the insurer to California not only by nationwide coverage, but a present and existing dispute in the California courts for which the insurer was obligated to appear here by its insurance contract.

Southern Guaranty's statement of questions presented does not accurately state the issues arising from the court of appeal's decision. [Petition, pp. i-ii]. Southern Guaranty attacks the decision by isolating on a few factors from the overall analysis. This allows Southern Guaranty the rhetorical device of arguing that each factor is too weak to support a finding of jurisdiction.[4] Southern Guaranty suggests the court of appeal's holding to be far broader than it is by arguing that each piece in the mosaic of jurisdiction is a separate and independent basis for the court's holding. The court of appeal did not base its finding of jurisdiction solely on "a presumption of economic benefit[5]", nor solely on "an

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3. *Szalay v. Handcock*, 307 Ark. 232, 819 S.W. 2d 684, 687 (1991) ("contractual definition of the policy territory satisfies the purposeful availment prong of the 'minimum contacts' inquiry."); *Eli Lilly & Co. v. Home Ins. Co.*, 794 F.2d 710, 720-721 (D.C. Cir.), *cert. denied*, 479 U.S. 1060 (1987) (jurisdiction found solely on coverage territory); *N.J. Auto. Full Ins. Underwriting Ass'n v. Indep. Fire Ins. Co.*, 253 N.J. Super. 75, 600 A.2d 1243, 1247 (1991) (same); *Labruzzo v. State-Wide Ins. Co.*, 353 N.Y.S. 2d 98, 102 (1974) (same); *Humble Oil & Refining Co. v. M/V John E. Coon*, 207 F. Supp. 45, 48 (E.D. La. 1962) (same); *Payne v. Mut. Fire & Auto. Ins. Co.*, 381 N.W. 2d 523, 526 (Minn. 1986) (same).

4. This Court has recognized that with questions of personal jurisdiction, there are no bright-line or mechanical rules for evaluating whether a corporation has the requisite contacts with the forum. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945). Southern Guaranty warps the analysis by breaking down the court of appeal's analysis of the connections between Southern Guaranty and California into severable, bright-line rules.

5. Southern Guaranty's Question Presented, no. 1.

inference of anticipation of suit based on a nationwide policy[6]", nor solely on "a presumption of Southern Guaranty's awareness of its insured's activities in California.[7]" The court of appeal, employing the flexible test mandated by this Court's decisions, found that the assembly or aggregation of factors — including Southern Guaranty's contractual agreement to appear nationwide, its economic benefit from premiums attributed to its California coverage, and its awareness of its insured's activities in California — dictated jurisdiction over Southern Guaranty in the related suit here on the policy. [Opinion, p. A6, appendix A to Petition].

Once the appropriate issue is identified, it becomes clear that the court of appeal's decision is consistent with the holdings of this Court on personal jurisdiction. The decision is also consistent with the majority of state and federal decisions that have considered the issue, virtually all of which have been omitted from discussion in Southern Guaranty's petition. The few opinions cited by Southern Guaranty that conflict with the decision below are the scattered minority of jurisdictions among the several states and the federal circuits on this now-familiar issue.

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6. Southern Guaranty's Question Presented, no. 2.

7. Southern Guaranty's Question Presented, no. 3. This issue is of little relevance to the consideration of the petition. The court of appeal did not explicitly hold that Southern Guaranty had notice of Southeastern's California activities or that such notice was required in order to find jurisdiction over Southern Guaranty. Southern Guaranty does not discuss this issue as phrased in its petition, arguing instead that Southern Guaranty's contact with California was based on Southeastern's unilateral activities.

II.

THE COURT OF APPEAL'S DECISION IS CONSISTENT WITH DECISIONS OF THIS COURT HOLDING THAT ECONOMIC BENEFITS OBTAINED FROM THE FORUM STATE WILL SATISFY THE DUE PROCESS REQUIREMENT OF "PURPOSEFUL AVAILMENT" TO SUSTAIN AT LEAST LIMITED PERSONAL JURISDICTION.

California's long-arm statute reaches to the limits authorized by the United States Constitution and is subject to the restraints of due process. Cal. Code Civ. P. § 410.10; *Cornelison v. Chaney*, 16 Cal. 3d 143, 147, 545 P.2d 264 (1976). This Court has held that the limits of due process on personal jurisdiction over a nonresident require the nonresident defendant to have such minimum contacts with the forum state "that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). The nonresident "should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

A nonresident must anticipate being hailed into court if it "purposefully avails itself of the privilege of conducting activities within the forum state." *Hanson v. Denckla*, 357 U.S. 235, 253, *reh'g denied*, 358 U.S. 858 (1958). The benefits and protections of the laws and market place in the forum state dictate that the nonresident stand ready to answer for the results of its activities and its obligations in the state. *Int'l Shoe*, 326 U.S. at 319. The due process clause should give potential defendants the ability to tailor their conduct with "minimal assurance" over where they may be held liable for that conduct. *World-Wide Volkswagen Corp.*, 444 U.S. at 297. Beyond that, it does not go. Once a party has by its

conduct within the state satisfied these minimal limits and benefitted from interstate activities, it may not shield itself in the due process clause from obligations that arose as a matter of course from those activities. *Burger King v. Rudzewicz*, 471 U.S. 462, 474-475 (1985).

Southern Guaranty's lack of offices, agents, or other physical presence in California does not render it immune from jurisdiction in California. "Purposeful availment" may be determined entirely from economic contact with the state. *Quill Corp. v. North Dakota By and Through Heitkamp*, 504 U.S. 298, 112 S.Ct. 1904, 1910-1911 (1992); *Buckeye Boiler Co. v. Superior Court*, 71 Cal. 2d 893, 901, 902, 458 P.2d 57 (1969). The jurisdictional inquiry looks beyond the physical trappings of presence such as offices and employees to the "commercial actuality" of the defendant's relationship to the forum and its having triggered results of its activity that it is reasonable to require it to explain and account for in California. *Buckeye Boiler Co.*, 71 Cal. 2d at 901-902. In *Quill Corp.*, this Court stated:

> [I]f a foreign corporation purposefully avails itself of the benefits of an economic market in the forum State, it may subject itself to the State's *in personam* jurisdiction even if it has no physical presence in the State.

504 U.S. 298, 112 S. Ct. at 1910-1911 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985)). Examination of economic contact may be particularly relevant where a contract is involved, and the courts look beyond the bare language of the contract to the entire contractual relationship between the parties. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478-479 (1985).

The court of appeal, with considerable care, undertook just such an analysis. The court found that Southern Guaranty had both

contractually bound itself to defend (and perhaps indemnify) Southeastern in California and received economic benefit from its promise. [Opinion, pp. A6, A13-A14, appendix A to Petition]. Southern Guaranty earned premiums from nationwide coverage that it could not have charged for coverage limited to its home state of Georgia, as the cases have emphasized that have examined the allocability of premiums within broad coverage territory.

Insurance companies benefit from issuing nationwide coverage. An insurance carrier earns premium dollars from the risks it assumes; Southern Guaranty took on risks far afield of Georgia.[8] The carrier matches prospective premium dollars against the odds and cost of being called on to defend cases in places remote from its home state. In *Eli Lilly & Co. v. Home Insurance Co.*, the D.C. Circuit discussed this process of matching costs and benefits:

> In determining the scope of the risk that they have insured, insurers must consider the scale on which its insured has distributed a potentially dangerous product. The broader the distribution, the higher the risk — and presumably the higher the premium. Thus insurers cannot be said to have failed to avail themselves, in a conscious and deliberate manner, of the benefits of doing business in those fora in which the manufacturer distributes its products.

794 F.2d 710, 721 (D.C. Cir.), *cert. denied*, 479 U.S. 1060 (1987).

Southern Guaranty argues that courts cannot extrapolate

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8. *Rossman v. State Farm Mut. Auto. Ins. Co.*, 832 F.2d 282, 287 (4th Cir. 1987) (limitation on policy territory would make policy less marketable).

economic benefit to the insurer from any single state within nationwide coverage. It is difficult to treat this argument as much more than a rhetorical device; that the carrier does not break out its premiums for the insured's benefit does not mean that it maintains no internal calculus to discern whether it is better off writing policies limited to one state, or fifty. Southern Guaranty is saying only that there is no dollar-for-dollar demonstration in the limited record presented by its motion to quash service[9] of that portion of Southeastern's gross premium attributable to its business in California. From this, Southern Guaranty concludes that there is no proof that Southern Guaranty charged *any premium at all* for its California coverage. The same argument can be made for each of the 50 states and several territories to which Southern Guaranty's nationwide coverage ran, from which Southern Guaranty would conclude that none of its premium dollars can be attributed to any state for which Southern Guaranty says it has made no allocation and will countenance none. By refusing to concede earned premiums in any state, Southern Guaranty concludes that it has availed itself of none of them.

Southern Guaranty argues that any minimal economic benefit found in its activities in California is too attenuated to meet due process requirements, citing *World-Wide Volkswagen*. [Petition, pp. 13-14]. This argument yields nothing to Southern Guaranty's promise to defend its insured here. *World-Wide Volkswagen* dealt with a tenuous economic tie — that automobiles were capable of being used in the forum. 444 U.S. at 298-299. Southern Guaranty contracted to defend Southeastern in California and received premiums for that promise.

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9. The plaintiff need only establish *prima facie* facts showing that jurisdiction exists. *Oregon v. Superior Court*, 24 Cal. App. 4th 1550, 1557, 29 Cal. Rptr. 2d 909, *rev. or reh'g denied*, August 18, 1994; *Ziegler v. Indian River County*, 64 F.3d 470 (9th Cir. 1995) (*prima facie* showing only where no evidentiary hearing by court).

Southern Guaranty believes it solicited no business within California, nor issued policies to California residents. [Petition, p. 13]. This point might in the strictest sense be true, but not because Southern Guaranty is not transacting business in California. It has simply found a way to do business in California without the immediate expense of an office or agent here. By offering coverage here and by agreeing to defend Southeastern if necessary in California, Southern Guaranty transacts an insurance business in this State even if writing the policy in Georgia was not transacting business in the first instance. Writing a single policy with coverage in California is sufficient to hold Southern Guaranty to jurisdiction here, regardless whether issuing that policy required the carrier to qualify to do business in this State. *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220 (1957); *McClanahan v. Trans-America Ins. Co.*, 149 Cal. App. 2d 171, 307 P.2d 1023 (1957).

III.

THE CONNECTION BETWEEN SOUTHERN GUARANTY AND CALIFORNIA WAS NOT ESTABLISHED BY UNILATERAL ACTS OF THE INSURED.

There is no requirement that an insurer must have notice of its insured's activities in the forum before the carrier is subject to jurisdiction there, so long as there is coverage and an insured event in the forum.[10] Southern Guaranty claims that this means that the

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10. *Rossman v. State Farm Mut. Auto Ins. Co.*, 832 F.2d 282 (4th Cir. 1987) (jurisdiction; no prior notice to insurer of insured's activity in forum); *Bevins v. Comet Casualty Co.*, 71 Ill. App. 3d 758, 390 N.E. 2d 500 (1979) (same); *McClanahan v. Trans-America Ins. Co.*, 149 Cal. App. 2d 171, 307 P.2d 1023 (1957) (same); *Klein v. Allstate Ins. Co.*, 202 Ga. App. 188, 413 S.E. 2d 777 (1991), *aff'd*, 262 Ga. 599, 422 S.E. 2d 863 (1992) (same); *Fukaya v. Velho*, 416 F. Supp. 785 (D.Guam 1976) (same); *Pugh v. Okla. Farm Bureau Mut. Ins. Co.*, 159 F. Supp. 155 (E.D. La. 1958) (same); *Farmers Ins. Exch. v. Portage La*

(Cont'd)

unilateral actions of the defendant can render the insurer subject to jurisdiction anywhere. [Petition, pp. 15-18]. It is true that with Southern Guaranty's policy in hand, Southeastern could venture into any state in the union, secure in the belief that it had insurance there. This is precisely what Southern Guaranty signed on for.

If Southern Guaranty did not wish to appear in a California court, it had the option of excluding California from its policy territory or ensuring in underwriting the policy that Southeastern did not conduct business there.[11] Southern Guaranty could also have required that the insured give notice of its intention to conduct business in a new state, but did not.[12]

(Cont'd)
Prairie Mut. Ins. Co., 907 F.2d 911 (9th Cir. 1990) (same); *Humble Oil & Refining Co. v. M/V John E. Coon*, 207 F. Supp. 45 (E.D. La. 1962); *Szalay v. Handcock*, 307 Ark. 232, 819 S.W. 2d 684 (1991) (same).

11. *Rossman v. State Farm Mut. Auto Ins. Co.*, 832 F.2d 282, 287 (4th Cir. 1987) (could omit forum from territory); *Fukaya v. Velho*, 416 F. Supp. 785, 787 (D.Guam 1976) (insurer chose to include Guam); *Pugh v. Okla. Farm Bureau Mut. Ins. Co.*, 159 F. Supp. 155, 159 (E.D. La. 1958) (insurer could omit forum from territory); *Farmers Ins. Exch. v. Portage La Prairie Mut. Ins. Co.*, 907 F.2d 911, 914 (9th Cir. 1990) (insurer controls amenability to suit); *Szalay v. Handcock*, 307 Ark. 232, 819 S.W. 2d 684, 687 (1991) (same).

Southeastern believes that Southern Guaranty or its agents were aware of Southeastern's activities in California, but it is not able to produce evidence to support this argument because no discovery was possible prior to Southern Guaranty's motion to quash.

12. *American & Foreign Insurance Association v. Commercial Insurance Co.*, 575 F.2d 980 (1st Cir. 1978), cited by Southern Guaranty, is not to the contrary. In that case the insurer's policy was structured to give the insurer notice of its insured's operations in Puerto Rico, unlike Southern Guaranty's policy. 575 F.2d at 982. By not structuring the policy to give itself notice of Southeastern's activities, Southern Guaranty has only itself to blame. Furthermore, the court in *American & Foreign* did not indicate that the insured was *required* to show that the insurer had actual knowledge of the insured's activities in the specific forum in order to establish jurisdiction, but noted that
(Cont'd)

Southern Guaranty argues that despite a lack of policy provisions requiring such notice, the law required its insureds to notify Southern Guaranty of their activities outside of Georgia if they wish those activities to be covered. [Petition, p. 17]. Southern Guaranty cites *Eli Lilly and Co. v. Home Insurance Co.*, 794 F.2d 710 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1060 (1987), as authority. This case does not support that view. In *Eli Lilly*, the court found jurisdiction over the nonresident insurer because the insurer agreed to provide nationwide coverage to a nationwide business. 794 F.2d at 720. Southern Guaranty claims that Southeastern never informed Southern Guaranty that Southeastern conducted business on a natiowide scale. [Petition, p. 17]. What else, one must ask, did Southern Guaranty conclude was the reason why Southeastern bought nationwide coverage? Southeastern in fact informed Southern Guaranty's agent that Southeastern conducted business outside of Georgia. [J.A. 260-261].[13] Even if Southeastern had never informed Southern Guaranty of its interstate operations, Southern Guaranty would be subject to jurisdiction in California.[14]

(Cont'd)

the insurer knew that it covered the risk arising from the insured's shipments of goods to each place of delivery. *Ibid.*

13. George Barnes stated in his declaration that:

> Southern Guaranty was made aware through our insurance broker when we purchased insurance from them that we advertised and, more recently, serviced computers in many states. We have been doing so for the several years that we have purchased insurance from Southern Guaranty, and the company has never until now questioned that our coverage was nationwide.

[Declaration of George A. Barnes, ¶9, J.A. 260-261].

14. *Payne v. Motorists' Mut. Ins. Cos.*, 4 F.3d 452, 456 n. 2 (6th Cir. 1993) (rejecting notice argument); *see* cases cited at note 10, above.

Southern Guaranty's argument is not about notice, but its claim that it was Southeastern's unilateral activity that connected Southern Guaranty with California. Several courts have held in explicitly rejecting Southern Guaranty's argument that the agreement to provide nationwide coverage — and the ability of the insurer to control the policy territory — satisfies the requirement that the nonresident be able to reasonably anticipate being haled into California (particularly given the likelihood of litigation where insurance claims are made). *Rossman v. State Farm Mut. Auto. Ins. Co.*, 832 F.2d 282, 287 (4th Cir. 1987) (nationwide policy, nature of insurance, and mobility of risk sufficient notice to carrier); *Szalay v. Handcock*, 307 Ark. 232, 819 S.W. 2d 684, 686-687 (1991); *Farmers Ins. Exch. v. Portage La Prairie Mut. Ins. Co.*, 907 F.2d 911, 914 (9th Cir. 1990) (same).

IV.

THE COURT OF APPEAL'S DECISION IS CONSISTENT WITH DECISIONS OF THE FEDERAL COURTS OF APPEAL.

The leading federal case on jurisdiction over a nonresident insurer is *Rossman v. State Farm Mutual Automobile Insurance Co.*, 832 F.2d 282 (4th Cir. 1987), in which the fourth circuit held that the insurer's agreement to defend its insured in any state subjects the insurer to jurisdiction in a state in which an insured event occurs.[15] In *Rossman*, an Indiana insurer issued an

15. *Rossman* has been approved by several other jurisdictions. *Bahn v. Chicago Motor Club Ins. Co.*, 98 Md. App. 559, 634 A.2d 63, 71 (1993); *Parker v. Fireman's Ins. Co.*, 297 S.C. 166, 375 S.E. 2d 325, 326 (1988); *Payne v. Motorists' Mut. Ins. Cos.*, 4 F.3d 452, 455 (6th Cir. 1993); *Szalay v. Handcock*, 307 Ark. 232, 819 S.W. 2d 684, 686 (1991); *Farmers Ins. Exch. v. Portage La Prairie Mut. Ins. Co.*, 907 F.2d 911, 913-914 (9th Cir. 1990); *Guardian Royal Exch. Assurance, Ltd. v. English China Clays, P.L.C.*, 815 S.W. 2d 223, 227 (Tex.), *reh'g of cause overruled*, (Sept. 11, 1991) (dictum; jurisdiction declined on other grounds); *N.J. Auto. Full Ins. Underwriting Ass'n v. Indep. Fire Ins.*, 253 N.J. Super. 75, 600 A.2d 1243, 1247 (1991).

automobile liability policy to an Illinois resident who was involved in a fatal accident in Virginia. The insurer was not qualified to do business in Virginia; it wrote and delivered the policy in Illinois, and the premiums were paid in Illinois. The court found that jurisdiction over the insurer was proper in Virginia:

> As an automobile liability insurer, [the insurer] could anticipate the risk that its clients would travel in their automobiles to different states and become involved in accidents and litigation there.... Here [the insurer] specifically promised to defend its policy-holders from any claim or suit arising from a loss or accident within its policy territory, which included the entire United States.... *[The insurer's] expectation of being haled into court in a foreign state is an express feature of its policy.* If [the insurer] wished to avoid suit in Virginia or any other forum, it could have excluded that state from the "policy territory" defined in the policy. [The insurer] is well aware that such a limitation would make its policy less marketable.

Id. at 286-287.

The ninth circuit reached the same result under Montana law in *Farmers Insurance Exchange v. Portage La Prairie Mutual Insurance Co.*, 907 F.2d 911 (9th Cir. 1990), in which one of two insurers on a risk sued the other for breach of contract and bad faith denial of coverage. The defendant insurer was a Canadian company that had issued an automobile insurance policy to Canadian residents involved in an accident in Montana. The Canadian company had never sold insurance in Montana and had no agents there; based on the Canadian insurer's duty to defend, the court nonetheless exercised jurisdiction.

In its analysis, the court relied heavily on *Rossman. Portage La Prairie,* 907 F.2d at 913-914. It also noted that there is a minority of courts that have relied on *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), to find jurisdiction lacking over insurers whose only contact with the forum is the issuance of an insurance policy. The court distinguished *World-Wide Volkswagen* because that case did not involve a duty to defend:

> Unlike the automobile sellers in *World-Wide Volkswagen*, automobile liability insurers contract to indemnify and defend the insured for claims that will foreseeably result in litigation in foreign states. [Citation.] Thus litigation requiring the presence of the insurer is not only foreseeable, but it was purposefully contracted for by the insurer. . . . [U]nlike a product seller or distributor, an insurer has the contractual ability to control the territory into which its "product" — the indemnification and defense of claims — will travel.

Portage La Prairie, 907 F.2d at 914; *see also Rossman*, 832 F.2d at 286. This reasoning is directly supported by the decisions of this Court, as the Minnesota Supreme Court recently noted:

> The approach of asserting personal jurisdiction over insurance companies exemplified by *Farmers Ins. Exch.* faithfully observes the Supreme Court's emphasis in contract cases on the future consequences contemplated by the parties when executing the contract. In the general liability insurance context, the parties contemplate that the insurer will defend and indemnify the insured.

> Further, the defense is presumably contemplated to occur where the insured is sued.

Domtar Inc. v. Niagara Fire Ins. Co., 533 N.W. 2d 25, 32 (Minn. 1995).

In *Payne v. Motorists' Mutual Insurance Companies*, 4 F.3d 452, 455-456 (6th Cir. 1993), the sixth circuit held that jurisdiction over a nonresident insurer was proper based on the insurer's agreement to defend its insured in any of the fifty states. The Ohio carrier argued that jurisdiction was not proper in Tennessee to resolve a coverage dispute for an accident in Tennessee under a policy it had issued to an Ohio insured. The insurer argued that it did not have offices, agents, or bank accounts in Tennessee. The sixth circuit followed *Portage La Prairie* and *Rossman*, finding that the insurer had chosen to provide nationwide coverage in order to market its policies and by doing so had purposefully availed itself of the privilege of doing business in Tennessee. 4 F.3d at 456.[16]

Southern Guaranty's reliance on *Hunt v. Erie Insurance Group*, 728 F.2d 1244 (9th Cir. 1984), is hopelessly misplaced. In *Hunt*, the plaintiff was injured in an accident in another state, but moved to California after the accident in order to obtain better medical treatment. She sued her insurer in California. Neither the insured nor the insurer had prior contact with California. The ninth circuit rejected the insured's attempt to insinuate its insurer into a forum that neither party had a prior connection with. *Id.* at 1247-1248.

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16. The sixth circuit noted that there was no significant difference between the burden of attending to the suit concerning coverage and the burden of providing a defense in Tennessee. *Ibid.*

The insurer in *Portage La Prairie*[17] made the same argument that Southern Guaranty bases on *Hunt*. The ninth circuit dismissed this argument, stating:

> The precedent cited by [the insurer] is not controlling. In *Davis*, 861 F.2d at 1161, and *Hunt v. Erie Ins. Group*, 728 F.2d 1244, 1247 (9th Cir. 1984), the forum choice was the result of the plaintiff's unilateral change of residence *after* the occurrence of the tortious event giving rise to the litigation. Here, the forum was the situs of the accident. Unlike *Davis* and *Hunt*, the forum in this case had a substantial connection to the litigation.

Farmers Ins. Exch. v. Portage La Prairie Mut. Ins. Co., 907 F.2d 911, 914 (9th Cir. 1990) (emphasis in original). The ninth circuit's holding in *Hunt* is a rejection of the argument that an insured may sue its carrier in any state based on the nationwide coverage; it does not contradict the court of appeal's decision to allow jurisdiction under the nationwide coverage provision in a state *in which an insured event has occurred.*

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17. Discussed above at pages 14-15.

V.

THE COURT OF APPEAL'S DECISION IS CONSISTENT WITH CALIFORNIA AND THE MAJORITY OF OTHER STATES THAT HAVE CONSIDERED THIS ISSUE.

McClanahan[18] in California, *Rossman*[19] and the decisions of 18 other jurisdictions[20] — including Southern Guaranty's home

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18. *McClanahan v. Trans-America Ins. Co.*, 149 Cal. App. 2d 171, 307 P.2d 1023 (1957).

19. *Rossman v. State Farm Mut. Auto. Ins. Co.*, 832 F.2d 282 (4th Cir. 1987).

20. **Arizona:** *Batton v. Tenn. Farmers Mut. Ins. Co.*, 153 Ariz. 268, 736 P.2d 2 (1987); **Arkansas:** *Szalay v. Handcock*, 307 Ark. 232, 819 S.W. 2d 684 (1991); **District of Columbia:** *Eli Lilly & Co. v. Home Ins. Co.*, 794 F.2d 710 (D.C. Cir.), *cert. denied*, 479 U.S. 1060 (1987); **Georgia:** *Klein v. Allstate Ins. Co.*, 202 Ga. App. 188, 413 S.E. 2d 777 (1991), *aff'd*, 262 Ga. 599, 442 S.E. 2d 863 (1992); **Guam:** *Fukaya v. Velho*, 416 F. Supp. 785 (D. Guam 1976); **Illinois:** *Bevins v. Comet Casualty Co.*, 71 Ill. App. 3d 758, 390 N.E.2d 500 (1979); **Louisiana:** *Giannouleas v. Phoenix Maritime Agencies, Inc.*, 525 So. 2d 1043 (La. 1988), *reversing* 525 So. 2d 1067 (La. App. 1 Cir. 1988); *Pugh v. Okla. Farm Bureau Mut. Ins. Co.*, 159 F. Supp. 155 (E.D. La. 1958); *McKeithen v. M/T Frosta*, 435 F. Supp. 572, 578 (E.D. La. 1977); *Humble Oil & Refining Co. v. M/V John E. Coon*, 207 F. Supp. 45 (E.D. La. 1962); **Maryland:** *Bahn v. Chicago Motor Club Ins. Co.*, 98 Md. App. 559, 634 A.2d 63 (1993); **Minnesota:** *Payne v. Mut. Fire & Auto. Ins. Co.*, 381 N.W. 2d 523 (Minn. 1986); **Montana:** *Farmers Ins. Exch. v. Portage La Prairie Mut. Ins. Co.*, 907 F.2d 911 (9th Cir. 1990); **Nevada:** *Jarstad v. Nat'l Farmers Union Property & Casualty Co.*, 92 Nev. 380, 552 P.2d 49 (Nev. 1976); **New Jersey:** *N.J. Auto. Full Ins. Underwriting Ass'n v. Indep. Fire Ins.*, 253 N.J. Super. 75, 600 A.2d 1243 (1991); **New York:** *Labruzzo v. State-Wide Ins. Co.*, 353 N.Y.S.2d 98 (1974); **Pennsylvania:** *United Farm Bureau Mut. Ins. v. U.S. Fidelity & Guar. Co.*, 501 Pa. 646, 462 A.2d 1300 (1983); **Puerto Rico:** *Am. & Foreign Ins. Ass'n v. Commercial Ins. Co.*, 575 F.2d

(Cont'd)

state of Georgia — hold that nationwide coverage and a duty to defend an action on an insured risk are sufficient to justify jurisdiction over the insurer in an action on the policy. Jurisdiction exists regardless of the insurer's lack of offices, agents, or qualification to do business in the state.[21] The court of appeal found this to be the majority rule. [Opinion, pp. A9-A10, appendix A to Petition].

Southern Guaranty's citations to "conflicting" state cases are

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(Cont'd)
980 (1st Cir. 1978); *United States v. SS Ocean Eagle*, 47 F.R.D. 519 (1969); **South Carolina:** *Parker v. Fireman's Ins. Co.*, 297 S.C. 166, 375 S.E. 2d 325 (1988); **Tennessee:** *Payne v. Motorists' Mut. Ins. Cos.*, 4 F.3d 452 (6th Cir. 1993); **Texas:** *Guardian Royal Exch. Assurance, Ltd. v. English China Clays, P.L.C.*, 815 S.W. 2d 223 (Tex.), *reh'g of cause overruled* (Sept. 11, 1991); *Magnus Maritec Int'l, Inc. v. SS St. Panteleimon*, 444 F. Supp. 567 (S.D. Tex. 1978).

21. *See, e.g., McClanahan v. Trans-America Ins. Co.*, 149 Cal. App. 2d 171, 174, 307 P.2d 1023 (1957); *Klein v. Allstate Ins. Co.*, 202 Ga. App. 188, 413 S.E. 2d 777 (1991), *aff'd* 262 Ga. 599, 422 S.E. 2d 863 (1992); *Szalay v. Handcock*, 307 Ark. 232, 819 S.W. 2d 684 (1991); *Eli Lilly & Co. v. Home Ins. Co.*, 794 F.2d 710 (D.C. Cir.), *cert. denied*, 479 U.S. 1060 (1987); *Fukaya v. Velho*, 416 F. Supp. 785 (D. Guam 1976); *Bevins v. Comet Casualty Co.*, 71 Ill. App. 3d 758, 390 N.E. 2d 500 (1979); *Giannouleas v. Phoenix Maritime Agencies, Inc.*, 525 So. 2d 1043 (La. 1988), *reversing* 525 So. 2d 1067 (La. App. 1 Cir.); *Pugh v. Okla. Farm Bureau Mut. Ins. Co.*, 159 F. Supp. 155 (E.D. La. 1958) (Louisiana law); *Payne v. Mut. Fire & Auto. Ins. Co.*, 381 N.W. 2d 523 (Minn. 1986); *Farmers Ins. Exch. v. Portage La Prairie Mut. Ins. Co.*, 907 F.2d 911 (9th Cir. 1990) (Montana law); *Jarstad v. Nat'l Farmers Union Property & Casualty Co.*, 92 Nev. 380, 552 P.2d 49 (1976); *N.J. Auto Full Ins. Underwriting Ass'n v. Indep. Fire Ins.*, 253 N.J. Super. 75, 600 A.2d 1243 (1991); *Labruzzo v. State-Wide Ins. Co.*, 353 N.Y.S. 2d 98 (1974); *Am. & Foreign Ins. Ass'n v. Commercial Ins. Co.*, 575 F.2d 980 (1st Cir. 1978) (Puerto Rico law); *Parker v. Fireman's Ins. Co.*, 297 S.C. 166, 375 S.E. 2d 325 (1988); *Payne v. Motorists' Mut. Ins. Cos.*, 4 F.2d 452 (6th Cir. 1993); *Magnus Maritec Int'l, Inc. v. SS St. Panteleimon*, 444 F. Supp. 567 (S.D. Texas 1978) and *Rossman v. State Farm Mut. Auto. Ins. Co.*, 832 F.2d 282 (4th Cir. 1987) (Virginia law).

not persuasive.[22] *Batton v. Tennessee Farmers Mutual Insurance Co.*, 736 P.2d 2 (Ariz. 1987), is inappropriate because no duty to defend was implicated. [Petition, p. 23-24]. *Batton* noted the rule of *Rossman*, but found that the rule did not apply because "[i]n the present case, no one has sued [the insured] in Arizona." 736 P.2d at 6.

Waste Management, Inc. v. Admiral Insurance Company, 138 N.J. 106, 649 A.2d 379 (1994), is distinguishable and not contrary to the decision of the court of appeal. In *Waste Management*, the nonresident insurers issued policies covering solely immovable risks in other forums and had investigated and determined that they were not covering other additional risks. *Id.* at 384-385, 389. The New Jersey Supreme Court held that the nonresident insurers were not subject to jurisdiction in New Jersey under a nationwide territory provision alone. The court held that there must be a forum-related event apart from nationwide coverage to subject the insurer to jurisd' ction. *Id.* at 389.

Southern Guaranty relies on *Domtar Inc. v. Niagara Fire Insurance Co.*, 533 N.W. 2d 25 (Minn. 1995) for the proposition that an insured must know of the presence of a risk in the forum before being subject to jurisdiction there. *Domtar* involved insurance for toxic waste at a tar-manufacturing site, an immovable risk. Although the court was somewhat more detailed in its assumptions, the court in *Domtar* acted precisely on what the court of appeal did here: it presumed that through its underwriting

22. Southern Guaranty cites to cases from the only two jurisdictions have disagreed with the court of appeal's approach, Wisconsin and Florida. [Petition, pp. 25, 27, citing *Marsh v. Farm Bureau Mut. Ins. Co.*, 179 Wis. 2d 42, 505 N.W. 2d 162 (Wis. App. 1993) and *Meyer v. Auto Club Ins. Ass'n*, 11 Fla. Law Weekly 327, 492 So. 2d 1314 (1986)].

process the insurer had become aware of the insured's activities in the forum. *Id.* at 33.[23]

VI.

THE COURT OF APPEAL CORRECTLY DETERMINED THAT THE EXERCISE OF JURISDICTION IN CALIFORNIA WAS REASONABLE.

Once minimum contacts have been established, the defendant must "present a *compelling case* that the presence of some other considerations would render jurisdiction unreasonable." *Great-West Life Assurance Co. v. Guarantee Co. of North America*, 205 Cal. App. 3d 199, 209, 252 Cal. Rptr. 363 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985)) (emphasis added). To avoid jurisdiction in California, Southern Guaranty needed to demonstrate that the inconvenience of the California forum amounts to a denial of due process. *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 224 (1957).[24]

It would be no significant burden to Southern Guaranty to defend itself in California. The witnesses on the duty to defend at issue in this case are Southeastern's officers, its insurance agent in Georgia (who declined to object to appearing as a witness in

23. It is not necessary that the insured have notice of the insureds activities in the forum. *See* above, pages 10-12. The insurer controls the policy provisions and the decision to issue the policy, and should not be able to claim ignorance because of poor underwriting procedures.

24. *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987), cited by Southern Guaranty, is not applicable. [Petition, pp. 21-22]. In *Asahi*, this Court found that the minimum contact requirements of the due process clause were not met. 480 U.S. at 112-113. Thus, the presumption in favor of the reasonableness of jurisdiction did not apply. *Asahi* also involved an alien defendant, so the burdens of litigating in California were far more severe than those that Southern Guaranty would face litigating in California.

California), and officers or other personnel of Triad Systems Corporation in California or Illinois. [J.A. 83-101]. It is particularly important to Southeastern Express that it be able to pursue its claims against Southern Guaranty in California because it can compel the attendance of these witnesses in California, but not in Georgia.[25] In contrast, Southern Guaranty showed only that there were unnamed persons at Southern Guaranty who might "desire to attend the trial" in California and would therefore find themselves inconvenienced.[26] [J.A. 275].

As this Court recognized almost 40 years ago, with the ever-increasing amount of business done across state lines, the burden on a party sued in a forum other than the one in which it is domiciled is minimal.

> [A] trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part this is attributable to the fundamental transformation of our

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25. The availability of witnesses in the forum supports the exercise of jurisdiction. *McGee v. Int'l Life Ins. Co.*, 355 U.S. at 223; *Payne v. Motorists' Mut. Ins. Cos.*, 4 F.3d 452, 456 (6th Cir. 1993) (location of the accident and witnesses reasonable forum); *Pugh v. Okla. Farm Bureau Mut. Ins. Co.*, 159 F. Supp. 155, 159 (1958); *N.J. Auto Full Ins. Underwriting Ass'n v. Indep. Fire Ins.*, 253 N.J. Super. 75, 600 A.2d 1243, 1246 (1991) (efficiency favors having forum of accident and witnesses).

26. Southern Guaranty was unable to identify any witness who would be inconvenienced because no one from Southern Guaranty had direct contact with Southeastern Express or Triad Systems from which relevant evidence might emerge on the interpretation of Southern Guaranty's policy. [J.A. 84-85, 93-94]. Only the agent who handled the dealings between Southern Guaranty and Southeastern Express was implicated in negotiations between them which might have produced relevant testimony on the meaning of the policies. [*Ibid.*]. He is not inconvenienced by appearing in California. [J.A. 94].

> national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. *At the same time, modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.*

McGee, 355 U.S. at 222-223 (emphasis added).

California has an interest in regulating the conduct of carriers like Southern Guaranty which are otherwise unregulated by California's Insurance Code, yet have an active duty of defense or indemnity in California. This dispute is not insular; it concerns significant economic activity with impacts on California residents. To require nonresidents to litigate elsewhere disputes centered in California would cede to other states the power to decide policies and issues of significant impact on California residents and the California economy.[27]

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27. Guaranty's argument that Georgia provides an adequate forum adds nothing, because an alternative forum will always be available in such disputes. What Southern Guaranty does not disclose is that it hopes to take advantage of antiquated notice rules in Georgia's insurance law to deny Southeastern coverage. *Caldwell v. State Farm Fire & Casualty Ins. Co.*, 192 Ga. App. 419, 385 S.E. 2d 97 (1989) (no coverage where notice late). To allow Southern Guaranty to take this dispute to Georgia would reward Southern Guaranty for its tactics of delay in California and would encourage the filing of reflexive lawsuits.

CONCLUSION

Based on the foregoing, respondents Southeastern Express Systems, George Barnes, Kevin Clark and Gerry Wambolt respectfully request that this Court deny Southern Guaranty Insurance Company's petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A — VERDICT FORM
FILED FEBRUARY 3, 1995

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA -
(SAN FRANCISCO BRANCH)

CASE NO. C 92 1539 FMS

TRIAD SYSTEMS CORPORATION, a Delaware corporation,

Plaintiff,

v.

SOUTHEASTERN EXPRESS CO., a Georgia de facto partnership dba SOUTHEASTERN BROKERAGE COMPANY dba SOUTHEASTERN SYSTEMS; SOUTHEASTERN EXPRESS SYSTEMS, INC., a Georgia corporation; GEORGE BARNES, an individual; KEVIN CLARK, an individual; and GERRY WAMBOLT an individual,

Defendants.

SOUTHEASTERN EXPRESS SYSTEMS, INC., a Georgia corporation,

Counterclaimant,

v.

TRIAD SYSTEMS CORPORATION,

Counter-defendant.

VERDICT FORM

Appendix A

1. Has the plaintiff, Triad Systems Corporation ("Triad"), proven by a preponderance of the evidence that the defendants, Southeastern Express Systems, George Barnes, Gerry Wambolt and Kevin Clark (collectively referred to as "Southeastern"), infringed Triad's copyrights when servicing Triad computers?

Yes ✗ No ____

2. If you found Southeastern infringed Triad's copyrights when servicing Triad computers, what amount of money, if any, do you award Triad as damages caused by Southeastern's infringement?

$650,000

3. Has Triad proven by a preponderance of the evidence that Southeastern infringed Triad's copyrights by distributing Triad software when brokering used Triad computers?

Yes ✗ No ____

4. If you found Southeastern infringed Triad's copyrights by distributing Triad software when brokering used Triad computers, what amount of money, if any, do you award Triad as damages caused by Southeastern's infringement?

$76,832

5. Has Triad proven by a preponderance of the evidence that Southeastern is liable for contributory infringement of Triad's copyrights when performing port expansion upgrades?

Yes ✗ No ____

Appendix A

6. If you found Southeastern is liable for contributory infringement of Traid's copyrights when performing port expansion upgrades, what amount of money, if any, do you award Traid as damages caused by Southeastern's contributory infringement?

$11,340

DATED: February 3, 1995

s/ Peter Dito
JURY FOREPERSON